Judgment for the plaintiffs.

Solicitors: *Braddell Bros.; Battenberg & Talma.*

SOO SENG HUAT v. PUBLIC PROSECUTOR

[A.Cr.J. (Chang Min Tat J.) October 4, 1967]

[Penang — Criminal Appeal No. 40 of 1967]

Gaming — Character lotteries — Common Gaming Houses Ordinance, 1953, s. 4(1)(c) — Possession of a record of stakes — Presumption under s. 11 — Onus.

Once possession is proved then the presumption under section 11 of the Common Gaming Houses Ordinance, 1953 passes the burden on the defendant to rebut the presumption on a balance of probabilities that that particular record refers to no lottery at all or to a lottery not then in progress. If he does so, he is entitled to an acquittal. If he does not do so or if he cannot do so he must be convicted.

Case referred to:—

(1) *Public Prosecutor* v. *Neoh Boon Cheong* [1960] M.L.J. 31.

MAGISTRATE'S CRIMINAL APPEAL.

Haji Suhaimi bin Dato' Haji Kamaruddin (Deputy Public Prosecutor) for the appellant.

Geh Cheng Lock for the respondent.

Chang Min Tat J. (delivering oral judgment): The respondent in this appeal was on the 23rd of April, 1967 found in possession of a record of stakes in character lotteries bearing the date April 4, 1967. Arising from that possession the respondent was charged in the magistrate's court with the offence of assisting in carrying on a public lottery, punishable under section 4(1)(c) of the Common Gaming Houses Ordinance. At the conclusion of the case for the prosecution and on the submission of the counsel for the respondent, the respondent was acquitted and discharged without his defence being called. Against that acquittal and discharge the public prosecutor now appeals.

The respondent in the court below relied upon the existence of the date April 23, 1967 on the record of stakes as casting some doubt upon any allegation that the record relates to a lottery then in progress. That reliance is clearly seen in the record of the learned trial magistrate and that submission would appear to weigh very considerably in his mind when he came to write his grounds of judgment. With every respect to everybody concerned that submission runs counter to the decision of the Court of Appeal in the case of *Public Prosecutor* v. *Neoh Boon Cheong*,[1] a decision which is not only binding on me but with which I respectfully agree. Possession having been proved against the respondent, a presumption is raised against him and until the contrary is proved, he is presumed to be assisting in a public lottery then in progress.

I do not think it is necessary or possible for me to add anything more to the interpretation of section 11 in the case cited and all that remains for me to say is that once possession is proved, then the presumption under section 11 passes the burden on the defendant to rebut the presumption on a balance of probabilities that that particular record refers to no lottery at all or to a lottery not then in progress. If he does so, he is entitled to an acquittal. If he does not do so or if he cannot do so he must be convicted. That does not mean to say of course that the presumption cannot be rebutted merely from the prosecution evidence. It can. But in this particular case reliance by the defence was placed on the date April 23, 1967 on the record of stakes but this date does not, in my view, in the absence of any evidence from one side or the other, establish as a fact that that record of stakes relates to that date specifically. Evidence must be called and such evidence must come from the defence having regard to the presumption and section 106 of the Evidence Ordinance.

The appeal is therefore allowed, the acquittal is set aside and the case is remitted to the magistrate for him to call upon the defence. The respondent is allowed bail in the sum of $1,000 in one surety.

Appeal allowed. Acquittal set aside. Case remitted to magistrate to call upon the defence.

SIVASUPRAMANIAM v. PUBLIC PROSECUTOR

[A.Cr.J. (Gill J.) October 5, 1967]

[K.L. — Criminal Appeal No. 54 of 1967]

Local Authority — Commencing building operations without prior authority — Whether owner of building liable — Municipal Ordinance (S.S. Cap. 133), s. 144(12) — Construction of.

In this case the appellant who was not the owner of the land commenced building operations involving the erection of a building without the prior approval of the appropriate authority in contravention of subsection (7) and punishable under subsection (10)(a) of section 144 of the Municipal Ordinance. He was charged in the magistrate's court and convicted on the overwhelming evidence of witnesses who saw him putting up the extension in respect of which the charge was made. This evidence was not rebutted. The main ground of appeal turned on the construction of subsection (12) of section 144 which by a statutory fiction deems the owner to have commenced or carried out the building operation.

Held: the reading of section 144 as a whole makes it clear that the legislature intended to saddle the owner of the land with the sole responsibility of seeing that section 144 was complied with. It is extremely unfair to saddle owners of land with this responsibility, especially when it is a common occurrence in most of the big Municipal areas and some of the Town Board areas for people to put up unauthorized buildings on lands not belonging to them and to squat on them, but

it is a situation which only the legislature can remedy. A simple remedy would be to amend subsection (12) by inserting in the appropriate place words such as "in the absence of proof to the contrary", or to delete the subsection altogether. The courts can do no more than to construe any law enacted by the legislature in its wisdom, and it can construe subsection (12) in no other way than to hold that no person other than the owner of a land can be charged with and convicted of any offence connected with building operations thereon under section 144 of the Ordinance.

Cases referred to:—

(1) *Lim Beng Teck* v. *R.* [1957] M.L.J. 21.

(2) *Darus bin Ahmad* v. *Public Prosecutor* [1965] 1 M.L.J. 200.

(3) *Public Prosecutor* v. *Phang Swee Lan* [1960] M.L.J. 6.

MAGISTRATE'S CRIMINAL APPEAL.

S. Kulasegaran for the appellant.

Robert K. C. Hoh for the respondent.

Cur. Adv. Vult.

Gill J.: This appeal from a decision of the magistrate's court in Kuala Lumpur raises the much debated question as to whether, in view of the provisions of sub-section (12) of section 144 of the Straits Settlements Municipal Ordinance (Cap. 133) as applied to the Malay States including the Municipality of Kuala Lumpur by the Municipal Ordinance (Extended Application), No. 3 of 1948, a person other than the owner of a land can be charged with and convicted of the offence of commencing any building operations involving the erection of a building thereon without the prior approval of the appropriate authority in contravention of sub-section (7) and punishable under sub-section (10) (a) of section 144 of the Municipal Ordinance.

In the Singapore case of *Lim Beng Teck* v. *R.*[1] Whyatt C.J. answered the question in the negative, and his decision was followed by Suffian J. in *Darus bin Ahmad* v. *Public Prosecutor* [2] in which the appellant's conviction on a charge of erecting an unauthorized building contrary to section 91(i) of the Town Boards Enactment (F.M.S. Cap. 137) was quashed because of section 93(ii) of the said Enactment which is *in pari materia* with section 144(12) of the Municipal Ordinance.

In *Public Prosecutor* v. *Phang Swee Lan,*[3] however, Adams J. held that, though the words of section 144(12) of the Municipal Ordinance, which create a statutory fiction, are unequivocal, it does not mean that the legislature intended to make the owner of the land solely responsible where building operations have been commenced contrary to the provisions of section 144(7) of the Ordinance and to prevent an action being taken against the actual offender when the proper authorities know who he is. His Lordship therefore allowed the appeal against the acquittal by the magistrate of the respondent who, not being the owner of the land, had erected a wooden house thereon without the approval of the Municipal Councillors. On a reference under section 34 of the Courts Ordinance, 1948 the Court of Appeal, however, dismissed the appeal on the ground that there was not a scrap of evidence that the respondent had done anything in the way of commencing or carrying on building operations, and in the circumstances declined to give a decision on the second question as to the construction of sub-section (12) of section 144 of the Municipal Ordinance.

In the present case also one of the grounds of appeal is that there was no evidence before the magistrate to justify his finding that the appellant had commenced building operations as charged. That ground of appeal, in my opinion, is untenable here. The learned magistrate had before him the evidence of Yoong Lee (P.W.1), the owner of the land, who testined that she had known the defendant for about 7 years and that she saw the defendant putting up the extension to the building in respect of which the charge was laid. She further said that she saw two Chinese men and one indian man putting up the said extension and the defendant assisting and supervising the two Chinese men. There was also the evidence of Yap Ying Choi (P.W.2), a building inspector attached to the Kuala Lumpur Municipality, who stated in evidence that when he went to the land on 20th November, 1964 he saw an extension by way of an open hall to the existing Indian temple.

The learned magistrate has stated in his grounds of judgment that he relied on the evidence of these two witnesses, that he was very impressed by their demeanour in court and that both of them gave prompt and straightforward answers to whatever questions were put to them by the prosecutor and the defence counsel. The learned magistrate has further stated that, having satisfied himself that the prosecution had established a *prima facie* case which if unrebutted would warrant a conviction, he caned on the defendant to enter his defence to the charge. The defendant elected to remain silent. In the circumstances the learned magistrate had no option but to convict him. The appeal on this ground must therefore fail.

The main ground of appeal turns on the construction of sub-section (12) of section 144, which reads as follows:—

> "Where any building operations are commenced or carried out in respect of any building, they shall be deemed to have been commenced or carried out by the owner of the land whereon such building is erected and he shall be liable therefor."

Sub-sections (7), (10) and (11) of section 144 speak of "no person", "any person" and "a person" respectively, whereas sub-section (12) speaks of "the owner of the land whereon such

building is erected". The point made by Whyatt C.J. in *Lim Beng Teck's case* (1) was that if the legislature, having taken the unusual course of establishing a legal fiction for the purpose of facilitating a prosecution, had intended that a prosecution could also be brought on a factual basis, sub-section (12) would have contained some qualifying words, limiting the operation of the legal fiction to those cases where no prosecution was or could be brought on a factual basis. With that reasoning of his Lordship I respectfully agree. The other point made by his Lordship was that if, in the absence of such qualifying words, the construction contended for the respondent was correct, it would follow that two prosecutions could be brought under section 144 and two punishments could be imposed on two different persons, notwithstanding that only one offence had been committed by one person. To my mind, that is not a serious objection, as there are offences known to the law for which two separate persons can be charged, as, for example, in the case of some offences under the Road Traffic Ordinance, 1958.

In my judgment, the reading of section 144 as a whole makes it clear that the legislature intended to saddle the owner of the land with the sole responsibility of seeing that section 144 was complied with. I agree that it is extremely unfair to saddle owners of land with this responsibility, especially when it is a common occurrence in most of the big Municipal areas and some of the Town Board areas for people to put up unauthorized buildings on lands not belonging to them and to squat on them, but it is a situation which only the legislature can remedy. A simple remedy would be to amend sub-section (12) by inserting in the appropriate place words such as "in the absence of proof to the contrary", or to delete the sub-section altogether. The courts can do no more than to construe any law enacted by the legislature in its wisdom, and I can construe sub-section (12) in no other way than to hold that no person other than the owner of a land can be charged with and convicted of any offence connected with building operations thereon under section 144 of the Ordinance. On that ground I am compelled to allow this appeal and to set aside the conviction and the fine imposed on the appellant and the order made against him to demolish the extension.

Appeal allowed.

Solicitors: *Ranjit, Thomas & Kula; Shook Lin & Bok.*

MAIDIN PITCHAY & ANOR. v. PUBLIC PROSECUTOR

[A.Cr.J. (MacIntyre J.) October 12, 1967]

[Ipoh — Criminal Appeal No. 49 of 1967]

Road Traffic — Using car as public service vehicle without valid licence — Using car without there being in force a policy of insurance in respect of third party risk — Road Traffic Ordinance, 1958, ss. 92(1) and 74(1).

Evidence — Police observations over motor vehicle suspected of being used contrary to s. 92(1) of the Road Traffic Ordinance — Admissibility of — Evidence Ordinance, 1950, s. 15 — Presumption — Road Traffic Ordinance, s. 144.

The appellants were convicted by a magistrate at Parit Buntar, Perak, of offences under sections 92(1) and 74(1) of the Road Traffic Ordinance, 1958. The first appellant was charged as the person who used a motor vehicle and the second appellant, who was the registered owner of the said vehicle, for permitting its use as a public service vehicle without a valid licence and using the said vehicle without there being in force a policy of insurance in respect of third party risk in contravention of the aforesaid provisions of law. At the trial, two police constables testified that they had kept watch over the said vehicle almost daily from June 26 to July 10, 1966 and during that period, had seen and recorded particulars of their observations. The first appellant was observed by police to have been using the same car in all 60 trips for conveyance of passengers of different racial origins. On July 22, 1966 the date of the commission of the alleged offence, the first appellant was stopped by the police and found to be carrying 5 passengers consisting of two men, a Chinese and a Malay, and three women, two of whom were Malays and one Indian. The defence was called. The first appellant denied carrying passengers concerned on July 22, for hire or reward but averred that he has intended to give them a free lift. The second appellant's defence was a general denial of the charge. He denied giving any authority to the first appellant to convey passengers for hire or reward.

Held: in view of the statutory presumption under section 144, the question of whether or not on the material date the conveyance of passengers was for hire or reward does not arise in a prosecution under section 92(1) of the Road Traffic Ordinance. It was to be presumed. It was for the defence to show that the the passengers were not carried for hire or reward. The obvious way, besides a bare denial, of proving a negative proposition such as this, was for the accused to call evidence to show that the incident in respect of which he is charged was an isolated one and that all the passengers happened to be in the car through circumstances which are fortuitous and not intentional.

Ali bin Hassan v. *Public Prosecutor* (1) dissented from.

Observations on the evidence of watch kept by the police.

Cases referred to:—

(1) *Ali bin Hassan* v. *Public Prosecutor* [1967] 2 M.L.J. 76.

(2) *Abdul Hamid* v. *Public Prosecutor* [1962] M.L.J. 44, applied.

(3) *Darus* v. *Public Prosecutor* [1964] M.L.J. 146, applied.

(4) *Makin* v. *Attorney-General of New South Wales* [1894] A.C. 57.